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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973
No. 73-605

IRWIN HAL BOBROW,

Petitioner,

vs.

THE MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES,

Respondents.

THE PEOPLE OF THE STATE OF CALIFORNIA,

The Real Party in Interest.

BRIEF OF THE REAL PARTY IN INTEREST IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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IN THE

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October Term, 1973

No. 73-605

IRWIN HAL BOBROW,

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THE MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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BRIEF OF THE REAL PARTY IN INTEREST IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner was arrested on January 17, 1973. As a result of this arrest, a felony complaint was filed by the Los Angeles District Attorney's office against him and a co-defendant on January 19, 1973. On January 24, 1973 he was arraigned on the felony.

Pursuant to a written notice, sent to petitioner by the office of the Los

Angeles City Attorney, the petitioner appeared for arraignment on the present charge of Section 23105 of the Vehicle Code on February 22, 1973 in Division 63, Los Angeles Municipal Court. The arraignment was continued to March 19, 1973 for a motion to dismiss.

The following day, February 23, 1973, the petitioner returned to Division 91, Los Angeles Municipal Court, with regard to the felony charge. At that time, the petitioner was referred to the Los Angeles County Probation Department for possible diversion pursuant to Penal Code Sections 1000 et seq.

On March 19, 1973, the petitioner was diverted pursuant to Sections 1000 et seq. of the Penal Code in the felony case. The case was continued for six months, the petitioner waiving time for trial. The felony had not been dismissed; there has not yet been an acquittal or conviction and sentencing. The petitioner never pleaded guilty to the felony charge or any other charge.

Petitioner's statement on page 3 of the Petition that he admitted his guilt of

the felony charge on February 23, 1973 is false. The true facts are reflected in the copy of the docket sheet for the felony charge included in this brief.

After discovering that there was a misdemeanor charge, as well as the felony charge, pending against him, the petitioner never moved to consolidate the two cases.

ARGUMENT

I

THE SUPREME COURT OF THE UNITED STATES SHOULD NOT TAKE JURISDICTION TO REVIEW A JUDGMENT WHERE NO OPINION WAS DELIVERED BY THE HIGHEST STATE COURT

The Supreme Court of the State of California, the Court of Appeal of the State of California, and the Appellate Department of the Superior Court of Los Angeles County delivered no opinions in this case. Said appellate court therefore did not in any way pass upon any federal questions.

The appellate jurisdiction of the United States Supreme Court over a state

court cannot be based upon the supposed denial of a federal right which was not urged in the trial court or called to the attention of or decided by the state appellate court. Cincinnati, N.O. & T.P.R. Co. v. Slade, 216 U.S. 78, 54 L.Ed. 390.

Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Stembridge v. State of Georgia (1951) 343 U.S. 541, 547, 96 L.Ed. 1130, 72 S.Ct. 834.

II

THE DECISIONS OF THE CALIFORNIA SUPREME COURT AND COURT OF APPEAL AND THE SUPERIOR COURT OF LOS ANGELES COUNTY IS IN CONFORMITY WITH THE LAWS OF CALIFORNIA, STATE COURT DECISIONS AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Petitioner contends that the Fourteenth Amendment requires that the state not be permitted to harass a defendant with multiple prosecutions arising out of the same set of circumstances. Petitioner

cites the California Supreme Court decision in Kellett v. Superior Court, 63 Cal.2d 822, 48 Cal.Rptr. 366 as authority for the fact that this has been recognized in California.

In support of his position as to what the constitutional standard is with regard to multiple prosecutions, petitioner cites three cases. Ciucci v. Illinois, 356 U.S. 571, 78 S.Ct. 839, 2 L.Ed.2d 983, and Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 were cases whose facts were substantially different from those of the present case. In both cases, the conviction being appealed from were affirmed. If these cases set the constitutional standard, then the standard set by Kellett v. Superior Court, supra, is much more restrictive.

Also cited by petitioner is Hoag v. New Jersey, 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913. As in the other two cases cited, the conviction was affirmed in Hoag. Furthermore, Hoag has in effect been overruled by the decision in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469. Even the rule of Ashe is less

restrictive than that in Kellett. The petitioner has, therefore, no complaint if the present case was decided in conformity with Kellett, supra.

For reasons which will be apparent, this case does not present a situation where the petitioner was being unwillingly harassed by multiple prosecutions.

In discussing the rational behind Kellett, the court in People v. Hartfield, 11 Cal.App.3d 1073, 90 Cal.Rptr. 274, stated, "The rule against multiple prosecution found in Section 654 [Penal Code of California] is a procedural safeguard against harassment by the government of persons accused of crime." The court went on to point out that since, in that case as in ours, the defendant was aware of two separate prosecutions that should have been filed and tried together before either one went to trial, he should have moved to join the two cases. Not having done this, he cannot use a rule designed to prevent harassment to have one case dismissed when he ". . . could at any time have avoided any harassment by moving for consolidation of the charges pursuant to

Penal Code Section 954. . . ." (Page 1080.)

Any harassment due to the existence of two charges in different courts pending against the petitioner is only the result of the petitioner's own attempt to mislead the courts involved in the present matter. The procedural facts of the present case show that the petitioner was aware of the felony and present misdemeanor charge before he agreed on the diversion of the felony. It further shows that he never made a motion to consolidate the two cases. he has agreed to diversion and eventual dismissal on a case that should not have been diverted and he seeks to have the misdemeanor dismissed because of the improper diversion.

This situation arose due to the fact that there are two prosecutorial agencies involved and the only one who knew what the two agencies were doing was the petitioner.

It is just such a situation that Kellett speaks about on page 827 where the court said:

> "We recognize that in many places felonies and misdemeanors

are usually prosecuted by different public law offices and that there is a risk that those in charge of misdemeanor prosecutions may proceed without adequately assessing the seriousness of a defendant's conduct or considering whether a felony prosecution should be undertaken. When the responsibility for the prosecution for the higher offense lies with a different public law office there is also the risk that a well advised defendant may plead guilty to a misdemeanor to foreclose a subsequent felony prosecution the misdemeanor prosecutor may be unaware of or may choose to ignore. Cases may also arise in which the district attorney is reasonably unaware of the felonies when the misdemeanors are prosecuted. In such situations the risk that there may be waste and harassment through both a misdemeanor and felony

prosecution may be outweighed by the risk that a defendant guilty of a felony may escape proper punishment. Accordingly, in such cases section 654 does not bar a subsequent felony prosecution except to the extent that such prosecution is barred by that section's preclusion of multiple punishment."

In the present case, the misdemeanor is the violation which has the greater consequences. The felony involved, 11530 Health and Safety Code, has been diverted pursuant to Penal Code, Sections 1000 et seq. and will eventually result in a dismissal. The misdemeanor cannot be diverted and could result in the petitioner serving time in jail. Realizing this, the petitioner agreed to the diversion and then asked for the dismissal of the misdemeanor. If the petitioner had had the two cases consolidated, the felony would not have been diverted. Penal Code Section 1000(a)(3) makes it clear that Health and Safety Code Section 11530 cannot be diverted where there is evidence of a

non-divertible narcotics related violation such as Section 23105 of the Vehicle Code.

CONCLUSION

The Petition for Writ of Certiorari does not make a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this Court, or decided a federal question of substance not heretofore determined by this Court.

The matter should be dismissed.

Respectfully submitted,

BURT PINES,
City Attorney

WARD G. McCONNELL,
Chief of the Appellate Department

CHARLES J. FLEISHMAN,
Deputy City Attorney

Attorneys for the Real Party in Interest

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. A 068 267

THE PEOPLE OF THE STATE OF CALIFORNIA, VS.	DATE POSTED	APPEARANCE DATE	AMOUNT	RECEIPT OR BOND NO.	SURETY
DI HAL BOBROW	7302208	1-24-73	3500	84325/10K	NATL
MOND SERLES	7302208	1-24-73	3500	84.36.33.0K	NATL
Defendant(s)					

1973 Complaint filed, sworn to by D HOLMES, charging defendant(s) with having committed on 17 January 1973, in the County of Los Angeles, the felony offense(s) of:

VIOL OF SEC 11530 HEALTH AND SAFETY CODE, A FELONY, COUNT I

Warrant issued and ~~given to~~ for service.

The defendant is to be admitted to bail in the sum of $

Penalty assessment to be deposited $

DIV. 9 convened at 9:25 A.M., Cause called. Judge presiding.

People represented by

Reporter Dorothy de Roza

Defendant(s) in court and represented by R. K. Fusilier

gives true name as Charged

Defendant informed of the charge against him(her) and of his(her) right to the aid of counsel in every stage of the proceedings. Preliminary examination set for 2-23-73 at 8:30 A.M., Div 9

Bail set at $ 3,500 Defendant waives time for PE

Penalty assessment to be deposited $ 50

Copy of complaint given to defendant. ~~Defendant committed.~~ Subpoena issued.

Bail up to stand as to Def't to Court

Deputy Clerk;

DIV. 9 convened at 9:45 A.M., Cause called. Judge presiding.

People represented by K A White DDA Reporter C Glasgow

Defendant(s) in court and ~~represented by~~

R Richard Fusilier

Deputy Clerk;

Pursuant to Sec 1000.1 PC Referred to Probation officer for investigation & Report, Proceedings Suspended. Defendant waives Time for Trial Diversion Hearing set 3-30-73 Div 9/Bail up & Stand

Pursuant to Stipulation Complaint ordered amended to add viol Sec 11556 Health and Safety Code, a Misdemeanor Ct II (Same date & place as alleged in Count I)

(OVER)

No. A 068267

Page -2-

People of the State of California, Plaintiff.

vs. Lauren Hal Bobrow and Laymon Series

2-13-73 <Contd from Page 1>

As to Series only

Defendant enters his Plea of guilty as to Ct II. Referred to Probation Office Contd to 8:30 Am 3-30-73 Dw 91 for Probation Hearing & Sentence. Ct II to be dismissed at time of Sent Hearing. Bail up to Stand

Helen Roberts

As to Series

Pltf by K Richard Faulkner D by A K Arbate

As to Series: Cause continued to 8:30 Am 4-12-73 for Hearing re Diversion Dft Defendant & Stipulation, Defendant waives Time Bail up to Stand. Probation Report filed

As to Defendant Bobrow's Order

Proceedings as to Bobrow

the provisions of Sec 1000.2 PC Matter ordered Diverted for a period of Six Months, under the following conditions: Defendant is: (1) To obey all laws, orders, rules and regulations of the Court and the Probation Dept. (2) To participate in a program of education, treatment or rehabilitation aimed at drug abuse as directed by the Probation Officer. (3) Not to use or possess any narcotic, dangerous or restricted drugs or associate with persons except with valid Prescription, and stay away from any place where users congregate. (4) Not to associate with persons known by him to be narcotic or drug users or sellers. (5) Pay $250 Court Costs by 5pm 4-2-73. Cause Continued to 8:30 Am 4-12-73 Dw 91 for Report and appearance

(cont'd to Page 3)

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

ople of the State of alifornia, Plaintiff

vs. Erwin Hal Bolinger et al Defendant(s)

Date 1973

In this case DIV. 97 convened at 9 M., Cause called. Judge Leo Freund presiding. (M.C.A.)
Both parties ready. People represented by NO Reporter is ordered to take down proceedings as provided by law.
Defendant No in court and NOT represented by W Hoo Deputy Clerk

Date for for appearance and further report reset for 9-26-73 8:30 Am Div 97
Counsel & probation officer notified

APR 12 1973

C Sullivan
Deputy Sheriff is ordered to take down proceedings as provided by law.
11A 5 K Allwhite LEO FREUND
Defendant appeared by counsel and W Hoo Deputy Clerk
Sells + RK Fusilier

Pursuant to Stipulation plea of guilty as to count II set aside, and Count II Dismissed.
Pursuant to Sec 1000.2 PC Defendant waives time for Preliminary Examination for Probation Hearing, and for trial
Pursuant to Sec 1000.2 PC Cause ordered suspended for a period of Six Months under the following conditions:
Defendant is:
(1A) To obey all laws, rules, regulations of the Court and the Probation Department
(1B) To pay $100 Costs & Clerk Stay to 4-23-73
(2) To participate in a program of education treatment or rehabilitation aimed at drug abuse, as directed by the Probation Officer
(3) Not to buy or possess any Narcotics, dangerous or restricted drugs or hypodermic paraphernalia except with valid prescription and stay away from places where such are congregated

OVER

No. A068267

Page 4

People of the State of California, Plaintiff.

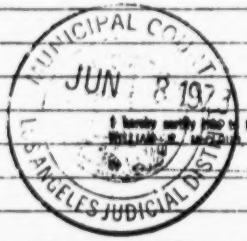
vs. Darwin Hal &
et

4-12-73 (Contd from Page 3)

(4) Not associate with persons known by him to be narcotics or drug users or sellers

Cause continued to 8:30 Am 9-
Dw 91 for further report a
Appearance.
Defendant released OR.

4-19-73 $100 Costs On Loc #974506 as to Serle



I hereby certify that to be a true and correct copy of the original Docket on file in this office,
WILLIAM A. [illegible], Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.
Lois E. Molnar JUN 8 1973